No. 76-1283

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

MILTON A. CALESNICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

SIDNEY M. GLAZER,
KATHERINE WINFREE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The order of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1977. The petition for a writ of certiorari was filed on March 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the use in evidence of statements made to law enforcement officials by petitioner after his arrest and in the absence of retained counsel violated petitioner's right to the assistance of counsel or his privilege against compelled self-incrimination.

2. Whether the Fourth Amendment was violated when a federal agent, who was standing on a public sidewalk, looked through a window into petitioner's premises and observed a controlled substance.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of the manufacture and possession of methaqualone with intent to distribute it (Counts I and II), in violation of 21 U.S.C. 841(a)(1), and on three counts of unlawful possession of other controlled substances, in violation of 21 U.S.C. 844(a). He was sentenced on Counts I and II to concurrent terms of five years' imprisonment to be followed by two years' special parole. Imposition of sentence on the remaining counts was suspended.

1. The sufficiency of the evidence of petitioner's guilt is not in dispute. In brief, it showed that on June 13, 1975, Drug Enforcement Administration (DEA) agents, acting pursuant to a warrant, searched petitioner's premises at 832 North Third Street, Philadelphia, Pennsylvania, and seized more than 1,000 grams of methaqualone, 35 drums of N-acetyl anthranilic acid (which petitioner had recently purchased), several empty drums that had contained that same chemical, and large quantities of ortho toluedine and anthranilic acid (1 Tr. 19-28, 34-35, 127, 138-139).[1] The search also produced a large heat reactor, a tableting

[1]"Tr." and "S.H." refer, respectively, to the four-volume trial transcript and the two-volume transcript of the pre-trial suppression hearing. "G. Ex." refers to government exhibits. "App." refers to petitioner's appendix in the court of appeals.

machine, and tablet punches (1 Tr. 26-35, 39, 71-72, 78-79, 85, 101, 109, 122-123; 2 Tr. 83).[2]

Later that day, DEA agents searched (also pursuant to a warrant) Cal-Vet Labs, Inc. (petitioner's corporation) at 320 Race Street, Philadelphia. That search uncovered, *inter alia*, six bottles labelled "Pentobarbital Sodium Tablets" and four bottles of liquid butabarbital, phendimetrazine, and sodium pentobarbital (1 Tr. 76, 99-100, 103, 124-125), each of which is a controlled substance (2 Tr. 18-19, 23). Petitioner, a chemist, was not registered with the DEA either to manufacture or to possess any controlled substances (G. Ex. 16; 2 Tr. 27, 33-34).[3]

[2]The methaqualone seized was brown in color, while pharmaceutical grade methaqualone is normally white (1 Tr. 140-142). Ortho toluedine and N-acetyl anthranilic acid are primary ingredients in the manufacture of methaqualone (1 Tr. 127-128); indeed, with the aid of a heat reactor, methaqualone can be produced from those two components alone (1 Tr. 137). Although N-acetyl anthranilic acid can be used legitimately to manufacture synthetic grape flavoring, the quantity of the chemical seized was sufficient to produce approximately one ton of such flavoring (1 Tr. 160).

The building that was searched was not marked or advertised as a laboratory, and the windows were boarded over (1 Tr. 73-74; G. Exs. 11-14).

[3]Testifying in his own behalf, petitioner maintained that the methaqualone seized was the residue of an experiment he had conducted in 1973, prior to the time the substance became federally controlled, and that he had destroyed the methaqualone produced at that time (2 Tr. 71-72, 77-78). He contended that he had purchased the N-acetyl anthranilic acid for experiments and for production of grape flavoring (2 Tr. 92, 97). According to petitioner, the sodium pentobarbital and butabarbital had been part of his stock when he sold veterinary supplies and the quantities seized had been at his 320 Race Street laboratory for many years before the substances were controlled (see, *e.g.*, 2 Tr. 58-59). He denied knowledge of the presence of the phendimetrazine (2 Tr. 58).

2. After the search at 320 Race Street, petitioner's attorney arrived in response to a telephone call from petitioner, who was then arrested and given *Miranda* warnings (1 S.H. 24, 33). Petitioner stated that he understood his rights, and his lawyer instructed him not to make any statements (1 S.H. 25, 33). No questions were asked of petitioner (1 S.H. 25-26).

The following morning, DEA Special Agent Wallace Mignault picked up petitioner from the jail where he had spent the night (1 S.H. 27; 1 Tr. 41). They ate lunch and then returned, at about noon, to the DEA office to await petitioner's arraignment and bail hearing, which was scheduled for approximately 1:30 p.m. (1 S.H. 27; 1 Tr. 41). At the DEA office, the agent and petitioner, who was "very talkative" (1 S.H. 27), engaged in general conversation. During that conversation, petitioner volunteered that he had tried unsuccessfully to make methaqualone (1 S.H. 27; 1 Tr. 42, 98). When Agent Mignault commented that the search at 832 North Third Street disclosed no polyphosphoric acid (a chemical that can be used to make methaqualone), petitioner said he did not need that chemical because he used a heat reactor instead (1 S.H. 27).

Following a pretrial hearing on petitioner's motion to suppress these statements, the district court found that Agent Mignault's comment about the absence of polyphosphoric acid "was designed to elicit a response and, therefore, it did constitute interrogation" (2 S.H. 44).[4] By

[4]Petitioner also moved to suppress several other statements he had made the previous day. Advised by the DEA agents that they were executing a warrant issued to search 832 North Third Street for methaqualone, petitioner queried, "What's that?" (1 Tr. 172-173). During the course of the search, he volunteered, "How was I to know to register with the government to produce or possess controlled substances?" and, "If I was making methaqualone it was by mistake" (1 Tr. 102). The district court ruled that these statements were voluntary and spontaneous and therefore admissible (2 S.H. 43-45). Additionally, when asked what he intended to do with the N-acetyl anthranilic acid, petitioner advised that he was using it for grape flavoring that he intended to sell to a Mr. Gillespie (3 Tr. 80-81). This statement was ruled inadmissible (App. 9) and was introduced only in rebuttal after petitioner testified he had not made such a statement (see 3 Tr. 52-54).

order of February 12, 1976, however, the court ruled that the statements were admissible, and they were introduced against petitioner at trial (App. 9).[5] In accordance with the provisions of 18 U.S.C. 3501, the district court also permitted the introduction by the defense of evidence relevant to the issue of voluntariness[6] and instructed the jury (4 Tr. 9-10) to weigh the statements in light of all attendant circumstances.

[5]At the conclusion of the suppression hearing, the court stated (2 S.H. 43-44):

> As to the remarks of or response to the remarks by Agent Mignault on the day following, it is my finding that that remark was designed to elicit a response from [petitioner] and, in spite of the Miranda warnings, he did respond.
>
> I am not too sure at this point what the effect of him changing his mind or failing to follow his lawyer's advice would have. I guess maybe you had better brief that as well.
>
> * * * [W]ell, I will rule that the comment by Mr. Mignault was designed to elicit a response and, therefore, it did constitute interrogation, but that doesn't necessarily make it suppressible. So I want you to brief that point.

These statements indicate that the court's subsequent ruling that petitioner's statements were admissible was based on the court's determination that petitioner had knowingly and intelligently waived his privilege against self-incrimination and his right to counsel.

[6]Petitioner maintained that he had told Agent Mignault in general terms that the manufacture of methaqualone did not necessarily require polyphosphoric acid (2 Tr. 115; 3 Tr. 54-55). He further testified that these statements were made after he spent the night in jail without sleeping facilities or food until he lunched with Mignault (2 Tr. 116).

ARGUMENT

1. Petitioner contends (Pet. 5-7, 9) that the statements made on the day following his arrest were obtained in violation of his Fifth Amendment privilege against compelled self-incrimination and his Sixth Amendment right to counsel and therefore should not have been admitted into evidence. Even though the district court found that Agent Mignault's comment regarding the absence of a particular chemical constituted interrogation, we submit that, taking into account all of the circumstances in this case, the statements were admissible. Even if their admission was error, however, it was harmless beyond a reasonable doubt.

a. Statements obtained after a person in custody has declined to answer questions are not inadmissible *per se*. *Michigan* v. *Mosley*, 423 U.S. 96, 102. Rather, their admissibility "depends under *Miranda* [v. *Arizona*, 384 U.S. 436] on whether his 'right to cut off questioning' was 'scrupulously honored' " (*id.* at 104). The record reflects that this standard was met here.

On the night of petitioner's arrest his lawyer instructed him not to make any statements. The agents respected petitioner's refusal to submit to questioning and at no time either asked him whether he wished to change his mind or sought to persuade him to do so. "This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." *Michigan* v. *Mosley*, *supra*, 423 U.S. at 105-106.

When Agent Mignault took petitioner to lunch on the following day, he initially did no more than engage in

conversation of a general nature with petitioner.[7] *Miranda* warnings were not given,[8] and the district court found that one statement made by the agent was designed to elicit a response even though it did not take the form of a question. But there is no evidence that petitioner was at any time subjected to ill treatment of any sort, to lengthy custodial interrogation, or to conscious overreaching on the part of the agent. Nor is there any evidence that petitioner was unable to appreciate the circumstances in which he found himself. To the contrary, petitioner is highly educated (with a doctorate in chemistry) and was familiar with the processes of the criminal law by virtue of earlier arrests in February and May 1975. In light of the totality of these circumstances (see *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 223-227), it seems plain that petitioner was aware that he did not have to say anything to Agent Mignault and that his decision voluntarily to raise the subject of his experience with methaqualone amounted to a knowing and intelligent waiver of his privilege against self-incrimination. *Miranda* v. *Arizona*, 384 U.S. 436, 475; cf. *United States* v. *Johnson*, 529 F. 2d 581 (C.A. 8), certiorari denied, 426 U.S. 909; *Smith* v. *United States* 505 F. 2d 824 (C.A. 6).

b. Similarly, in the circumstances of this case, petitioner's voluntary mention to Agent Mignault of his attempts to manufacture methaqualone amounted to a knowing and intelligent waiver of his right to counsel.

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[7]The record does not indicate why petitioner's counsel was not present during this time. There is no suggestion, however, that his absence was the product of any conduct on the part of the government.

[8]Both at the suppression hearing and at trial Agent Mignault testified that petitioner voluntarily raised the subject of his experiences with methaqualone (1 S.H. 27-28; 1 Tr. 41-42, 97-98). Petitioner never contradicted this account of the conversation (see 2 S.H. 26-27; 2 Tr. 114-116; 3 Tr. 54-56).

Neither *Massiah* v. *United States*, 377 U.S. 201, nor *Brewer* v. *Williams*, No. 74-1263, decided March 23, 1977, requires suppression on these facts. In *Massiah*, after the defendant had been indicted on narcotics charges and was released on bail, federal agents arranged for an informant to elicit and secretly transmit to agents stationed nearby inculpatory information concerning the crime that was the subject of the indictment. In *Brewer*, the defendant, who was being sought in Des Moines, Iowa, in connection with the abduction of a child, surrendered and was arraigned in Davenport, Iowa, 160 miles away. The defendant was represented by counsel in both Des Moines and Davenport, and the Des Moines police officers who drove to Davenport to bring the defendant back promised both counsel that they would not question the defendant about the crime during the trip. In disregard of that agreement, however, one of the officers did interrogate the defendant, who in response directed the officers to the place where he had hidden the child's body.

Massiah and *Brewer* share the common characteristic of a predesigned attempt by law enforcement officials to take advantage of the absence of defense counsel in questioning a defendant about a crime after the Sixth Amendment right to counsel had attached. That characteristic is absent here. There is no evidence whatever that Agent Mignault engaged in casual conversation with petitioner with an ulterior motive to elicit damaging statements from him in the absence of his counsel. The remark that the district court found was intended to elicit a response came only after petitioner himself had voluntarily adverted to the subject matter of the crime for which he had been arrested. At that point, the agent was not obliged to close his ears or to assume the role of defense counsel on petitioner's behalf. Rather, he

was entitled to assume that petitioner, an educated man with a previous acquaintance with the criminal law, spoke of his experiences with methaqualone in full awareness that he was privileged to remain silent and to have his counsel present before submitting to any interrogation. Accordingly, the agent's remark concerning the absence from petitioner's laboratory of a chemical used to manufacture methaqualone did not constitute unlawful interrogation, and the admission into evidence of petitioner's response to that remark did not violate petitioner's right to the assistance of counsel.

c. In any event, even if petitioner's statement was erroneously admitted, any error was harmless beyond a reasonable doubt. The quantity of drugs seized, the manner in which they were stored and used in petitioner's premises, petitioner's ability and equipment to process the methaqualone into tablets, and petitioner's other admissible statements provided overwhelming evidence of guilt. There was therefore no reasonable possibility that the challenged evidence might have contributed to the conviction. See *Milton* v. *Wainwright*, 407 U.S. 371; *Chapman* v. *California*, 386 U.S. 18, 24.

2. On June 13, 1975, subsequent to the search at 832 North Third Street, Agent Mignault went to 320 Race Street, the premises of Cal-Vet Labs, Inc. While standing on the public sidewalk in front of the building, he observed through the glass door and window a bottle labelled "Paraldehyde" and a barrel similar to the drums of N-acetyl anthranilic acid he had just seen during the search at 832 North Third Street (1 S.H. 65-72; 1 Tr. 45, 61, 71). The agent then obtained a warrant to search 320 Race Street for paraldehyde, which is a controlled substance. The affidavit supporting the warrant set forth the above facts and incorporated by reference the search warrant affidavits for 832 North Third Street.

Contrary to petitioner's contention (Pet. 8-9), the agent's observation through the window did not violate petitioner's Fourth Amendment rights. It is settled that a visual observation by a law enforcement officer situated in a place where he has a right to be is not a search within the meaning of the Fourth Amendment. *Ker* v. *California*, 374 U.S. 23, 42-43; *United States* v. *Johnson*, 506 F. 2d 674, 675 (C.A. 8), certiorari denied, 421 U.S. 917; *United States* v. *Walling*, 486 F. 2d 229, 236 (C.A. 9), certiorari denied, 415 U.S. 923; *James* v. *United States*, 418 F. 2d 1150, 1151 n. 1 (C.A. D.C.). Agent Mignault was lawfully situated on the public sidewalk (1 S.H. 66) when he looked through the "very big, large, glass window" and observed the bottle on a counter some 10 or 12 feet from the window (1 S.H. 65; 1 Tr. 71). "[T]he place was open and passersby could see inside" (1 S.H. 66). Moreover, the word "paraldehyde" was "unmistakable" (*ibid.*). Petitioner had no reasonable expectation of privacy with regard to what he knowingly exposed to the public. *Katz* v. *United States*, 389 U.S. 347, 351; cf. *United States* v. *Honore*, 450 F. 2d 31, 33 (C.A. 9), certiorari denied, 404 U.S. 1048 (items in residence observed through uncurtained window from public stairway); *United States* v. *Hanahan*, 442 F. 2d 649, 654 (C.A. 7) (evidence viewed through window from public sidewalk); *Ponce* v. *Craven*, 409 F. 2d 621, 625 (C.A. 9), certiorari denied *sub nom. Ponce* v. *California*, 397 U.S. 1012 (activities seen through window in motel room).[9]

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[9]Petitioner is incorrect in asserting (Pet. 8) that the law in the Fifth Circuit is to the contrary. See *United States* v. *Shima*, 545 F. 2d 1026, 1028-1029 (C.A. 5), pending on petition for a writ of certiorari, No. 76-6268. *United States* v. *Davis*, 423 F. 2d 974 (C.A. 5), certiorari denied, 400 U.S. 836, *Texas* v. *Gonzales*, 388 F. 2d 145 (C.A. 5), and *Brock* v. *United States*, 223 F. 2d 681 (C.A. 5), upon which petitioner relies, are distinguishable. In each of those cases the visual observation was made possible by means of a physical trespass into a constitutionally protected area. Here, by contrast, the agent looked through the window from a public area where he had a right to be.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

SIDNEY M. GLAZER,
KATHERINE WINFREE,
Attorneys.

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